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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

NO. 79-164

IRVING A. KANAREK, Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, and

THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Petitioner, Irving A. Kanarek respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, rendered March 1, 1973, denying Petitioner a hearing.

JURISDICTION

On November 1, 1972, the Court of Appeal of the State of California, Fourth Appellate District, made its order denying Petitioner a hearing of an application for writs of certiorari and mandamus, without opinion.

On March 1, 1973, the Supreme Court of the State of California made its order denying Petitioner a hearing in the same matter.

On June 23. 1973 Associate Justice William O. Douglas made an order extending the time for filing this petition to July 29, 1973.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

When a state court is required by statute to appoint and to compensate private attorneys for all members of a certain class of indigent persons who are accused of serious crimes, may the court impose on the enforcement of such a statute a certain condition or reservation, to wit, that the attorney who is chosen by the accused must also be chosen by the court, without offending the accused's right to counsel under the Sixth Amendment or his rights to due process and equal protection

under the Fourteenth Amendment, in the absence of compelling reasons for the imposition of such a condition or reservation?

STATEMENT OF THE CASE

(a) Classification of the accused:

One Manson, being accused in a California trial court of certain murders, was determined by the trial court to be

(1) Indigent;

(2) Ineligible to be represented by the Public Defender.

A state statute, California Penal Code Section 987(a), required that private attorneys be appointed and publicly compensated to represent persons of that class.

In addition to determining that the defendant belonged to the above-described class, the court also determined that the defendant was not qualified to represent himself and that he was not to be permitted to represent himself; hence he must be represented by an attorney.

Thus, it appears that the said defendant was a member of a certain class of persons possessing the following identifying characteristics, to wit:

(1) Accused of serious crimes;

(2) Indigent;

(3) Ineligible to receive public defender services; (hence entitled to publicly-financed private representation); and

(4) Ineligible for self-representation (hence being unable to defend without counsel).

(b) Chronology:

A judge of the Respondent Court initially made an order permitting the defendant to represent himself; however, the trial judge later determined that the defendant should not be permitted to represent himself,[1/] and then appointed an attorney, without consulting the defendant as to this appointment. This was the only occasion on which the court selected an attorney for the defendant. This attorney was

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1/ In People v. Sharp (1972) 7 C.3d 448, 449 P. 2d 489, the California Court held that State trial courts have discretion to refuse to permit otherwise-competent accused persons to represent themselves.

replaced within a few weeks by an unexperienced volunteer attorney, who represented the defendant briefly. Finally, the defendant designated Petitioner as his counsel for trial.

The trial court stated to the defendant that he had the right to be represented by counsel of his choice, but if the defendant wished to have counsel appointed under the statute the choice of counsel would be made by the court alone. The court did not put the matter with such directness, but the court's position and intent was clear enough in the following remarks of the court:

> "I think you have already declared your indigency, and, if you like, the court will appoint the finest lawyer available to represent you . . . On the other hand, you have the right to select your own attorney, as you apparently have done with Mr. Kanarek, if that is what you want to do."
>
> (Emphasis supplied)

> "Now, as I have stated to you before, and I will state to you

> again, you have the right to select your own counsel. However, if you want the court to use its discretion in appointing a competent counsel to represent you during the trial, the court will do that.
>
> (Emphasis supplied)

At all times mentioned herein, California law concerning the duties of attorneys in criminal cases included the following Particulars:

Section 608 of the California State Business and Professions Code provided that

> "It is the duty of an attorney. . . .
> (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

In the case of People v. Massey (1955) 137 C.A. 2d 623, 290 P.2d 667, the California Court of Appeal remarked,

"Desertion of a client is inexcusable. . . . Having undertaken the defense of a criminal case an attorney must continue with his services until he is released by the court . . . . (Bus. & Prof. Code, §6068)."

(P. 626 of 137 C.A. 2d)

In the case of Hill v. Superior Court (1956) 46 C.2d 169, 174-175, 293 P.2d 10, the California Court held that the above-mentioned statutory duty of attorneys to accused persons justified the approval of a rather low award of attorneys' fees which had been made by a trial court under the California Appointment statute.

Petitioner accepted the defendant's case, although the trial court refused to appoint Petitioner under the statute. In granting the defendant's motion to enter Petitioner as his attorney, the trial court said,

"For the record, Mr. Kanarek, this is a private arrangement between you and Mr. Manson, and is not an appointment under 987(a) of the Penal Code."

Thereafter, from June 1, 1970 through April 19, 1971, Petitioner diligently represented the defendant in the trial court through all pre-trial and trial proceedings.

On April 17, 1972, Petitioner filed in the trial court a verified, itemized claim, in the usual form, for public compensation under the statute. The filing was timely. (Magnus v. Jackson, 1973, 31 C.A. 3d 399, _____ P.2d _____). On July 6, 1972, the trial court denied the claim.

On October 30, 1972, Petitioner filed a petition for mandate in the California Court of Appeal, Second Appellate District, which was the district in which the defendant had been tried, seeking an order directing the court to pay Petitioner for his services. Thereafter the petition was transferred by order of the California Supreme Court to the California Court of Appeal, Fourth Appellate District, where it was assigned the present California docket number, "4 Civ. No. 12365".

In this petition, Petitioner fully described the underlying proceedings in the trial court and contended that both the original order refusing to appoint Petitioner under the statute and the post-trial order denying Petitioner's claim for statutory compensation

violated the defendant's rights to counsel, due process and equal protection under the Sixth and Fourteenth Amendments. This petition for mandate was denied without opinion on January 26, 1973.

Within the time prescribed by California law, Petitioner filed a petition for hearing in the California State Supreme Court, raising the same constitutional issues, and on March 1, 1973 that court denied Petitioner's application without opinion.

Thereafter, on June 23, 1973, in this Court, Associate Justice William O. Douglas granted an order extending the time within which the within petition might be filed to July 29, 1973.

STATEMENT OF REASONS FOR GRANTING THE WRIT

Like all of the proliferating host of cases in this troublesome area of constitutional law, the issue is rooted in the great case of Gideon v. Wainright (1963) 372 U.S. 355, 9 L.Ed. 2d 799, 83 S.Ct. 792, which established the duty of states under the Sixth Amendment to provide counsel for indigent persons accused of serious crimes.

On March 5, 1973, four days after denying Petitioner's application for a hearing in this matter, the California Supreme Court decided the case of Drumgo v. Superior Court, 8 C.3d 930, _____ P.2d _____. As the following discussion of the Drumgo case will indicate, the Drumgo case clearly sets forth the level and the quality of the State's views of the constitutional issues which are presented in the instant case, and it is also apparent that the same views are the basis on which the California Court denied Petitioner's petition without opinion.

In Drumgo, the defendant, who was accused of murder and conspiracy to commit murder, was, like the defendant Manson in the instant case, a member of the class of accused persons who are entitled to be represented by publicly-compensated private counsel under the same statute (California Penal Code Section 987) and who are not permitted to defend pro se although being otherwise competent. As was the case with defendant Manson, Drumgo requested the appointment of a designated private attorney (Attorney Hodge) in whom he had confidence, but the trial court appointed its own chosen attorney, Mr. Breiner. As with the instant case, the attorney who was chosen by

the defendant but rejected by the trial court was ready, able and willing to serve under the statute.

Drumgo petitioned, successfully, in the California Court of Appeal for a writ of mandate ordering the trial court to appoint his chosen attorney. (See Opinion of the Court of Appeal, in Drumgo v. Superior Court, and reported in the Advance Sheets of the Official California Reports at 26 C.A. 3d 647 but not reported in the bound volume.)

The California Supreme Court took the case over and reversed the order of the Court of Appeal. Five Justices joined in the opinion and two dissented.

The majority opinion was based on two theories. These were,

> (1) A trial court's decision to make a statutory appointment of counsel against the defendant's wishes is a matter of discretion. The court's discretion is not abused unless it appears that the attorney chosen by the court is substantially less competent than the attorney who is chosen by the defendant, or it appears that the court's attorney is committed to

a position or interest which would conflict with his ability to provide an effective defense.

(2) In order to show an abuse of discretion, the defendant must meet a burden of showing that there was some special reason which justified him in lacking confidence in the court's chosen attorney.

The majority dod not go so far as to hold that there was a burden on the defendant to show that there was some special reason to him to have confidence in his <u>own</u> chosen attorney.

The dissenters agreed with the majority insofar as they regarded the matter of forcing unwelcome counsel on the defendant as a question of discretion, but they parted company with the majority on the matter of criteria, concluding that they would compel the trial court to appoint the attorney who was chosen by the defendant because it appeared that there was no practical reason for the trial court to <u>refuse</u> to accept the defendant's choice. In other words, the dissenters took the view that the burden was not on the defendant to demonstrate that the trial court's appointment was

an abuse of discretion, but that the burden was on the trial court (or on the real party in interest, the People) to demonstrate that the appointment was not an abuse of discretion. In reaching this position, the dissenters expressed, inter alia, the following views:

> "In the foregoing factual context, how is the administration of justice served by the dogged insistence that Mr. Breiner and not Mr. Hodge represent the defendant? Phrasing the question another way: what compelling state interest is served by denying appointment of the qualified and willing attorney of defendant's choice? The obvious answer is: none."
>
> (P. 936 of 8 C.3d)

> "Effective advocacy involves more than vigor, experience and familiarity with the law. The attorney-client relationship contemplates trust and mutual cooperation, particularly when the attorney is defending the client's liberty.

(Smith v. Superior Court (1968) supra, 68 C.2d 547, 561 [440 P.2d 65, 74 (condensation of more extensive discussion)]) The desirability of a relationship of trust and confidence between an indigent defendant and his attorney has been elevated to indispensability as a result of this court's recent decision in People v. Sharp (1972) 7 C.3d 448, 449 P.2d 489, holding that a defendant has no constitutional right to defend pro se at trial . . . . Thus, in this case, the defendant must proceed with the appointed attorney . . . . it seems inevitable that this procedure will create serious problems in the administration of justice throughout the trial and future appeals, if any."

(Pp. 938-939 of 8 C.3d)

"There is an implication in these proceedings that because defendant is indigent and counsel is

> appointed, the need for trust and confidence between attorney and client is somewhat less significant. We firmly rejected a similar implication in Smith v. Superior Court, supra, 68 C.2d at pages 561-562. . . ."
>
> (Pp. 939-940 of 8 C.3d)

Both the majority and the dissenters in the Drumgo case agreed on the proposition that the refusal to appoint qualified private counsel of the defendant's choice is a matter of discretion, although they reached sharply opposite results on the same record. The opposed modes of reasoning from the same premise (that refusal to appoint qualified counsel of the defendant's choice is a matter of discretion) demonstrate the constitutional infirmity of this premise, and the constitutional chaos which must ensue from continued efforts to decide constitutional issues on the basis of that premise.

All of the justices of the California Court spoke of the desideratum (even the constitutional desideratum) of a good attorney-client relationship. The majority went at the

matter from one approach, the minority from another. All have shied away from a second, more fundamental, aspect of the matter. This is the matter of the independence of the attorney from the pecuniary control or influence of the trial court.

All of the California Justices agree that the defendant should have confidence in his attorney. None recognize the problem which any accused person, even one of the most limited intelligence, feels immediately and instinctively: Putting it in terms of the thinking of the accused, the problem which immediately and invariably presents itself is, "How can I trust an attorney who is beholden to the judge when he asks for his fee?"

The minority in the Drumgo case went so far as to say that the trial judge should, in appointing counsel, have in mind the desideratum of providing the accused with a trial "that is not only fair but gives the appearance of being fair." (P. 936 of 8 C.3d) And the minority even went so far as to quote, at page 938 of 8 C.3d, from the Report on the A.B.A. Project on Minimum Standards for Criminal Justice, Providing Defense Services (Tentative Draft, 1967) Section 2.3, at page 19, as follows:

"The goal, states the ABA, is 'to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities . . . are quickly percieved by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately of society itself."

The California public defenders are guaranteed their funding independently of whether they happen to please the trial courts (California Govt. Code, Section 27700, ff.). Privately retained and compensated counsel likewise enjoy the same total freedom from pecuniary pressures. Hence the clients of both major classes of attorneys enjoy the same safety. The California Courts persistently assume, quite sub silentio, that the position of the third major class, those defendants who are both indigent and ineligible for the services of the public defenders, enjoy the same safety.

History (and even a modicum of common sense) teaches that the power of the purse,

however lightly held, and however often and well it may be self-restrained, is, despite the vaunted professionalism of the bar, a power of enormous vitality. Even assuming that the courts are presently blessed with nothing but ideal judges and ideal attorneys, the power of the purse represents nothing less than a continuing threat to the continued integrity of the adversary system of justice.

How can this persistent shadow across the courts be eliminated? There is only one clear answer, and that answer is for this court to hold that when an accussed person is unable to pay for private attorney services and is ineligible for public defender services, and thus qualifies for publicly-paid private representation, he and not the trial judge must, as a general rule, have the choice of counsel, at least when, although otherwise competent, he is not allowed the option of defending pro se.

This problem began to grow as soon as the decision in Gideon v. Wainright, supra, (1963) 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 799, was published. Inevitably, it must either be resolved by the doctrine which petitioner suggests, or it will continue to smoulder between the lines of such cases as Drumgo v. Superior Court, supra, (1973) 8 C.3d 930, ____P.2d____.

The minority in the Drumgo case remarked, referring to the proposed holding at page 940 of 8 C.3d,

> "While it might be desirable to recognize such a right [unqualified right of selection of private counsel] as an abstract principle, its application in the real world of criminal courts is fraught with complications."

Undoubtedly so. The same observation might be made with reference to the enunciation and enforcement of any great right or principle. Indeed, it is often said of the very institution of Democratic Government that it is a chaotic and corrupt system, ("fraught with complications") but it must also be said that all other systems are inferior to it, always becoming even more chaotic and corrupt (and more "fraught with complications").

It is ironic that the efforts of California and other States, not to mention the Federal Government, to extend the constitutional shelter of the Sixth Amendment to the indigent seem to have bred a new evil, that of the shadow of the

trial courts' powers of the purse over the shoulders of the particular class of indigent defendants to which Petitioner's client, Manson, belongs. But the impairment of the equal protection clause of the Fourteenth Amendment which falls on this class of accused persons is obvious. California and other states, including Colorado, Illinois, Minnesota and Wisconsin, have thus far shunted it aside, virtually pretending that it does not exist, much as our society used to deal with certain "social" diseases. Surely we can, and surely we must, do better.

DATED: July 17, 1973.

Respectfully submitted.

RENZI & KILBRIDE

Attorneys for Petitioner,
IRVING A. KANAREK,

By: Fred Kilbride
FRED KILBRIDE

APPENDIX "A"

ORDERS MADE IN THE COURTS BELOW:

(1) In the Court of Appeal, State of California, 4th District: Petition of Irving A. Kanarek for writ of mandate and writ of certiorari denied, November 1, 1972. (Case No. 4th Civ. 12365, Kanarek v. Superior Court, et al.)

(2) In the Supreme Court, State of California: Petition of Irving A. Kanarek for hearing following denial of petition for mandate/certiorari by Court of Appeal, denied, March 1, 1973. (Case No. 4th Civ. 12365 (sic) Kanarek v. Superior Court, et al.)

OPINIONS RENDERED IN THE COURTS BELOW:

No opinions filed.

APPENDIX "B"

PRESENTATION OF FEDERAL CONSTITUTIONAL QUESTIONS IN THE COURTS BELOW:

Petitioner specifically raised the contentions that the trial court's refusal to appoint and its refusal to order compensation under the California statute violated the defendant's rights to counsel, equal protection and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution, as shown by the following references to the certified record:

(1) In the Trial Court:

At pages 1, 2 and 12 of Petitioner's motion for compensation, originally filed as an Appendix to Petitioner's petition for writs of mandamus and certiorari in the California Court of Appeal.

(2) In the Court of Appeal, State of California:

At pages 10 and 16 of Petitioner's petition, with supporting argument naming the provisions, throughout the petition.

APPENDIX "B"

(3) In the Supreme Court, State of California:

At page 3. with supporting argument in the balance of the petition. Additionally, by virtue of California practice whereby the records of the Court of Appeal are forwarded to the Supreme Court upon the filing of petitions for review, the same citations as under category (2) hereinabove.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 14617 Victory Boulevard, Van Nuys California 91401.

On July 19, 1973, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on the Respondent and Real Party in Interest in said action, by placing t rue copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at the Van Nuys Post Office, Van Nuys, California, addressed as follows:

SUPERIOR COURT, County of Los Angeles
111 North Hill Street
Los Angeles, California 90012

JOSEPH P. BUSCH, DISTRICT ATTORNEY
210 W. Temple Street
Los Angeles, California 90012

LOS ANGELES COUNTY COUNSEL
Suite 648, Hall of Administration
Los Angeles, California 90012

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on July 19, 1973, at Van Nuys, California.

GLENNA BAILEY

Subscribed and sworn to before me this 18 day of July, 1973.

Mary Ellen Reed

Notary Public in and for the County of Los Angeles, State of California